

LESLIE E. DEVANEY  
ANITA M. NOONE  
LESLIE J. GIRARD  
SUSAN M. HEATH  
GAEL B. STRACK  
ASSISTANT CITY ATTORNEYS

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

**Casey Gwinn**  
CITY ATTORNEY

CIVIL DIVISION  
1200 THIRD AVENUE, SUITE 1100  
SAN DIEGO, CALIFORNIA 92101-4100  
TELEPHONE (619) 533-5800  
FAX (619) 533-5856

May 30, 2001

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

*FREDERICK R. DAYE v. FRANK ZELLMER, et al.*  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO. 99-56255

### **INTRODUCTION**

On May 8, 2001, the United States Ninth Circuit Court of Appeals issued a Memorandum Opinion affirming the defense verdict in the case *Daye v. Zellmer, et al.* Frederick Daye spent the first ten years of a life sentence in prison for a crime he did not commit. He was vindicated through DNA evidence, and upon release sued the San Diego Police officers responsible for his arrest. The civil trial, in which Daye alleged violation of his constitutional rights, was tried in United States District Court in San Diego in June of 1999. That trial resulted in a complete defense of all claims. Daye appealed. The Memorandum Opinion by the appellate court effectively terminates Daye's case. No money was paid to Daye.

### **HISTORY**

This case began over sixteen years ago. On January 18, 1984, Patrol Officer James Stevens observed a car traveling on Boundary Boulevard with a broken tail light. He directed the driver to pull over, with the intention of writing an equipment ticket. When he approached the car, he noticed the passenger (Daye) was holding an open can of beer in his lap. He asked for identification of the driver and passenger, both adult males. Daye, who was the passenger, did not have any identification, and told Officer Stevens his name was Kenneth Donaldson. Officer Stevens called for a back up unit because he needed to search the car. By coincidence, the officers that arrived as back up had taken the report of the victim of a kidnap, rape, and robbery one week earlier. The back up officers noticed that the passenger resembled the description given by the rape victim. They relayed their suspicion to Officer Stevens. Officer Stevens took Daye to the police station to confirm his identity and issue him a notice to appear for possession of an open container of alcohol and lying about his identity. After confirming his identity, Stevens discovered Daye had several recent arrests for violent crimes and had a felony record in

Minnesota. He told Daye he needed to take his photograph. Stevens took two photographs of Daye and released him. The photographs were forwarded to Detective Frank Zellmer of the Sex Crimes Unit.

Detective Zellmer included one of Daye's photographs in a photo line up that was shown to the rape victim. She identified Daye as one of the two men that kidnaped, raped, and robbed her. On January 25, 1984, based on the victim's identification, Daye was arrested by Officer Stevens. He was arraigned on January 27, 1984. Daye was tried and convicted in San Diego Superior Court in March of 1984 and sentenced to life in prison. At the criminal trial, the photographs taken by Officer Stevens were excluded because the trial judge determined they were taken in violation of Daye's Constitutional rights. The trial court determined Officer Stevens did not have the right to detain Daye for the Vehicle Code violations once he had confirmed his identity. Because Stevens did not have probable cause to detain Daye for any other crime at that time, the photographs were ruled to have been obtained pursuant to an illegally prolonged detention, and were "fruit of the poisonous tree".

Daye appealed his criminal conviction. On February 26, 1986, the California Fourth District Court of Appeal found the photographs were taken in violation of Daye's rights, but deemed the violation harmless error, and affirmed the conviction based on the victim's independent identification in court. During the next eight years, Daye filed three unsuccessful writs of habeas corpus. The third writ ordered DNA testing. Finally, on September 26, 1994, after ten years in prison, Daye was ordered released, and was deemed innocent based on the results of the DNA tests.

Two men were originally convicted of the crime, Daye and David Pringle. By the time of Daye's third writ petition, Pringle had declared that his accomplice was a man named Eddie Smallwood. Smallwood and Daye were very similar in appearance; they were of similar height, weight, hairstyle, facial hair, and they both had one metallic front tooth.

### **CIVIL TRIAL**

In November of 1995, Daye filed a civil action in federal court alleging numerous causes of actions including false arrest, negligence, infliction of emotional distress, and violations of his constitutional rights. He claimed extreme emotional distress as a result of spending ten years in prison for a crime he did not commit. He sued the city officers responsible for his arrest, the district attorney and the county investigators that assisted in the prosecution of the criminal trial. The prosecutor and his staff were immune from liability, and were dismissed. At the time of the trial, the only defendants remaining were City Police Officer James Stevens, retired City Police Detective Frank Zellmer, and the City. The jury found the officers reasonably relied upon the victim's identification, and had enough information to substantiate probable cause for Daye's arrest. The jury rendered a defense verdict on all counts.

**CIVIL APPEAL**

Daye appealed the trial verdict and earlier pretrial rulings. The appeal claimed Daye was denied a fair trial because of error in the jury instructions, that the trial judge made erroneous evidentiary rulings, and that Daye should have been allowed to present evidence that the officers unlawfully influenced the district attorney's decision to issue the criminal charges. The appellate court found for the City defendants on every claim, and affirmed the trial court decision. A copy of the decision of the Court of Appeals is attached.

Deputy City Attorney William S. Donnell tried the case, and argued the appeal.

Respectfully submitted,

/ S /

CASEY GWINN  
City Attorney

CG:WSD:rd  
Attachment  
RC-2001-19